**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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|---|---|---|
| PHILIP J. CHARVAT on behalf of himself and others similarly situated, | : | |
| Plaintiff, | : | Case No.: 2:14-cv-00376 |
| v. | : | |
| AUGEO AFFINITY MARKETING, INC. | : | |
| Defendant. | : | |

## CLASS ACTION COMPLAINT

Plaintiff Philip J. Charvat (hereinafter referred to as "Plaintiff") individually and on behalf of all others similarly situated alleges on personal knowledge, investigation of his counsel, and on information and belief as follows:

## Preliminary Statement

1. Plaintiff brings this action to enforce the consumer-privacy provisions of the Telephone Consumer Protection Act, a federal statute enacted in 1991 in response to widespread public outrage about the proliferation of intrusive, nuisance telemarketing practices. *Mims v. Arrow Financial Services, LLC,* 132 S.Ct. 740, 745 (2012).

2. Despite being registered with the National Do Not Call Registry, Mr. Charvat received multiple prerecorded telemarketing calls from the Defendant Augeo Affinity Marketing, Inc. ("Defendant").

3. Because the calls were transmitted using technology capable of generating hundreds of thousands of telemarketing calls per day, and because telemarketing campaigns

generally place calls to hundreds of thousands or even millions of potential customers *en masse*, Mr. Charvat brings this action on behalf of a proposed nationwide class of other persons who received illegal telemarketing calls from the Defendant.

**Jurisdiction and Venue**

4. This Court has subject matter jurisdiction over the claims in this case under 28 U.S.C. § 1331 because this action arises out of a violation of federal law. *See* 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).

5. Venue is appropriate in this district pursuant to 18 U.S.C. 1391(b)(2), as the Plaintiff is a resident of this district, and a substantial part of the events or omissions giving rise to the claim occurred in this district.

**Parties**

6. Plaintiff Philip J. Charvat is an individual citizen and resident of this district.

7. Plaintiff alleges that the Defendant Augeo Affinity Marketing, Inc. is a foreign corporation that is organized under the law of the state of Delaware and has a primary corporate address in Minnesota, and does business throughout the country, including this District.

**Legal Basis of the Claims**

8. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy [.]" Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

9. Through the TCPA, Congress outlawed telemarketing via unsolicited automated or pre-recorded telephone calls ("robocalls"), finding:

> [R]esidential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.
>
> . . . .
>
> Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call[,] . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

*Id.* § 2(10) and (12); *see also Mims*, 132 S. Ct. at 745.

10. The TCPA prohibits persons from initiating any telephone call to a residential telephone line using a prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order of the FCC. 47 U.S.C. § 227(b)(1)(B); *see also* 47 C.F.R. § 64.1200(a)(2).

11. The National Do Not Call Registry allows consumers to register their telephone numbers and thereby indicate their desire not to receive telephone solicitations at those numbers. *See* 47 C.F.R. § 64.1200(c)(2). A listing on the Registry "must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator." *Id.*

12. The TCPA and implementing regulations prohibit the initiation of telephone solicitations to residential telephone subscribers to the Registry. 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2).

13. A person whose number is on the Registry, and who has received more than one telephone call within any twelve-month period by or on behalf of the same entity in violation of the TCPA, can sue the violator and seek statutory damages. 47 U.S.C. § 227(c)(5).

14. The regulations exempt from liability a caller who has obtained the subscriber's signed, written agreement to receive telephone solicitations from the caller.

47 C.F.R. § 64.1200(c)(2)(ii). That agreement must also include the telephone number to which the calls may be placed. *Id.*

## Factual Allegations

28 Plaintiff is, and at all times mentioned herein was, a "person" as defined by 47 U.S.C. § 153.

29 The Defendant is, and at all times mentioned herein was a corporation, and a "person" as defined by 47 U.S.C. § 153.

30 On April 11, 2014, plaintiff received a telephone call on his residential phone line.

31 The phone call began with silence, and then after a pause a pre-recorded voice played the following message:

> Hello! Thank you for calling! Please listen carefully as our menu options may have changed. You may have been selected for a $100 Walmart gift voucher. In order to process your gift voucher we will need to transfer you to a live representative. Press 1 now to be connected. You get these free gifts just for taking a look at the nation's leading savings programs. These programs offer huge discounts and unadvertised savings at all your major retailers and grocery stores. Don't miss out on these fantastic gifts and offers. Simply press 1 now to be connected to a live representative. Our expert representatives will assist you in getting these gifts sent directly to your home. Supplies of these vouchers are limited so press 1 now to be connected and claim your $100 Walmart gift voucher today.

32 However, the Plaintiff did not call the Defendant, rather the Defendant placed an outbound call to the Plaintiff's residential line.

33 The Plaintiff pressed 1 to determine the source of the call.

34 After pressing 1, the Plaintiff was connected to an individual who identified herself as "Shamie".

35 "Shamie" proceeded to inform the Plaintiff that he would be receiving a $100 Walmart voucher after providing his address.

36 Later in the call, "Shamie" disclosed that there was a fee associated with the "promotion" that the Plaintiff was required to pay before receiving the voucher, and that there was also a discount rewards program that they were attempting to have the Plaintiff enroll in.

37 Finally, "Shamie" identified the website www.savingsgalore.com for further information about the program.

38 According to the website provided by "Shamie", "Savings Galore is a service of Augeo." *See* http://savingsgalore.com/about-us.php (Last Visited April 16, 2014).

39 The Plaintiff received calls with an identical pre-recorded message on February 24, 2014 and March 13, 2014.

40 When the Plaintiff pressed 1 on those calls to be connected to a live representative, he was placed on hold and then the call disconnected before the Plaintiff spoke with a live representative.

41 The Plaintiff never consented in any fashion to these telephone calls, and had no business relationship with the Defendant.

42 All of the calls alleged in this Complaint were unwanted telemarketing solicitations.

43 Plaintiff is not a customer of Defendant and has not provided Defendant with his personal information or telephone number.

44 All of the calls alleged in this Complaint were placed to a telephone number that Plaintiff had listed on the national Do Not Call Registry more than 12 months prior to these telephone calls to Plaintiff.

## Class Action Allegations

45 As authorized by Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of a class of all other persons or entities similarly situated throughout the United States.

46 The class of persons Plaintiff proposes to represent with respect to Count One is tentatively defined, subject to modification after discovery and case development:

> All persons within the United States whom Defendant, directly or through their agents, initiated a telephone call with a pre-recorded message within four years before this Complaint was filed.

47 The class of persons Plaintiff proposes to represent with respect to Count Two is tentatively defined, subject to modification after discovery and case development:

> All persons within the United States whose phone numbers were registered on the Do Not Call Registry, and who, within the four years before the filing of the initial Complaint, received more than one telemarketing call within any twelve-month period from, or on behalf of, Defendant.

Collectively, all these persons will be referred to as "Class members."

42. Excluded from the Class are the Defendants, and any entities in which the Defendants have a controlling interest, the Defendants' agents and employees, any Judge to whom this action is assigned and any member of such Judge's staff and immediate family, and claims for personal injury, wrongful death and/or emotional distress.

43. Class members are identifiable through phone records and phone number databases.

44. The potential class members number at least in the thousands. Individual joinder of these persons is impracticable.

45. Plaintiff is a member of the class.

46. The Plaintiff and the class have all been harmed by the actions of the Defendant.

47. This Class Action Complaint seeks injunctive relief and monetary damages.

48. There are questions of law and fact common to Plaintiff and to the proposed class, including but not limited to the following:

a. Whether the Defendant violated the TCPA by advertising via unsolicited prerecorded telemarketing calls;

b. Whether the Defendant can meet its burden of proof with respect to statutory defenses for the telemarketing calls;

c. Whether the Defendant's conduct was knowing and/or willful;

d. Whether the Plaintiff and the class members are entitled to statutory damages as a result of Defendant's actions;

e. Whether Defendant should be enjoined from engaging in such conduct in the future.

49. Plaintiff is an adequate representative of the class because his interests do not conflict with class member interests, he will fairly and adequately protect class member interests, and he is represented by counsel skilled and experienced in class actions, including TCPA class actions.

50. Common questions of law and fact predominate over questions affecting only individual class members, and a class action is the superior method for fair and efficient adjudication of the controversy. The only individual question concerns identification of class members, which will be ascertainable from records maintained by Defendant and agents.

51. The likelihood that individual class members will prosecute separate actions is remote due to the time and expense necessary to prosecute an individual case.

52. The interest of the Class members in individually pursuing claims against the Defendant is slight because the statutory damages for an individual action are relatively small, and are therefore not likely to deter the Defendant from engaging in the same behavior in the future.

53. Defendant has acted on grounds generally applicable to the Class, thereby making final injunctive relief and corresponding declaratory relief with respect to the Class as a whole appropriate.

54. The Plaintiff has retained counsel experienced in handling class action claims involving violations of federal consumer protection statutes, including claims under the TCPA.

55. Plaintiff is unaware of litigation concerning this controversy already commenced by others who meet the proposed class definition.

## CAUSES OF ACTION

### Count One:

### Violation of the TCPA's Do Not Call provisions

56. Plaintiff incorporates the allegations from all previous paragraphs as if fully set forth herein.

57. The Defendant violated the TCPA by (a) initiating telephone solicitations to persons and entities whose telephone numbers were listed on the Do Not Call Registry, or (b) by the fact that others made those calls on its behalf. *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2).

58. The Defendant's violations were negligent and/or knowing.

## Count Two:

## Violation of the TCPA's Prohibition against Advertising Using a Pre-Recorded Message

59. Plaintiff incorporates the allegations from all previous paragraphs as if fully set forth herein.

60. The Defendant violated the TCPA by initiating any telephone call to a residential telephone line using a prerecorded voice to deliver a message without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(B); *see also* 47 C.F.R. § 64.1200(a)(2).

61. The Defendant's violations were negligent and/or knowing.

## Count Three:

## Injunctive relief to bar future TCPA violations

62. Plaintiff incorporates the allegations from all previous paragraphs as if fully set forth herein.

63. The TCPA authorizes injunctive relief to prevent further violations of the TCPA.

64. The Plaintiff respectfully petitions this Court to order the Defendant and their employees, agents, and all other persons or entities working on their behalf to make these calls to immediately cease engaging in unsolicited telemarketing in violation of the TCPA.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court grant Plaintiff and all Class members the following relief against the Defendant:

A. Injunctive relief prohibiting such violations of the TCPA by the Defendant in the future;

B. As a result of the Defendant's willful and/or knowing violations of 47 U.S.C. § 227, Plaintiff seeks for himself and each Class member treble damages, as provided by statute, of up to $1,500 for each and every call that violated the TCPA;

C. As a result of Defendant's violations of 47 U.S.C. § 227, Plaintiff seeks for himself and each Class member $500 in statutory damages for each and every call that violated the TCPA;

D. An award of attorney's fees and costs to counsel for Plaintiff and the Class as part of a common fund or similar methodology;

E. An order certifying this action to be a proper class action pursuant to Federal Rule of Civil Procedure 23, establishing an appropriate Class and any Subclasses the Court deems appropriate, finding that Plaintiff is a proper representative of the Class, and appointing the lawyers and law firms representing Plaintiff as counsel for the Class;

F. Such other relief as the Court deems just and proper.

**THE PLAINTIFF DEMANDS A TRIAL BY JURY.**

PLAINTIFF,
By his attorneys

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